RELIANCE SHIPPING & TRAVEL AGENCIES SDN. BHD.

v.

LOW BAN SIONG

COURT OF APPEAL, KUALA LUMPUR
DATO' SITI NORMA YAAKOB JCA
DATO' V.C. GEORGE JCA
DATO' AHMAD FAIRUZ SHEIKH ABDUL HALIM J
[CIVIL APPEAL NO. W-04-23-95]
29 FEBRUARY 1996

CONTRACT: *Breach - Measure of damage - Compensation for breach of contract agreed upon - Whether could be recovered simpliciter - Whether compensation must be reasonable - Whether actual damage to be proved - Contracts Act 1950 s. 75 - Proper effect.*

The appellants had appointed the respondent as their tour representative, and pursuant to that, provided the respondent with on the job training as a tour guide. In consideration for the training, by an agreement dated 9 March 1987, the respondent undertook to serve the appellants for three years, and further, to pay the appellants RM20,000 as agreed compensation should he leave the appellants within the said period.

In breach of the agreement, the respondent left the appellants after serving for 2 years and 21/2 months. The appellants successfully sued for the agreed compensation in the Sessions Court, whereupon the respondent appealed. Azmel Maamor J ruled that the RM20,000 agreed compensation was unenforceable for being a penalty, and secondly that actual damage had not been proved by the appellants, and so, set the lower Court's judgment aside. Against this decision the appellants now appeal.

Held:

Per Siti Norma Yaakob JCA (delivering the judgment of the Court):

[1] Despite the qualifying words *"whether or not actual damage or loss is proved to have been caused thereby"* in s. 75 of the Contracts Act, damages allegedly suffered must be proved. A clause in an agreement falling within s. 75 must be subject to the Court's determination that such agreed damage is reasonable compensation for the injured party.

[2] In the present case, despite the nature of the amount stated (it being a penalty) the measure of damage is enforceable provided that there is proof by the appellants that they had suffered loss or damage to the extent of the quantum of the "agreed compensation".

[3] The nature of the loss suffered by the appellant is *inter alia* the expenses incurred by them for providing on the job training for the respondent. The appellant should not have difficulty in proving that loss if they had kept an account of the total expenses incurred for such training. No such account was forthcoming, and in the event, the learned Judge was right in holding that the appellants had failed to prove actual loss suffered. It was insufficient for the appellant to rely on the amount stipulated in the agreement as their measure of damages without proving actual loss.

[Appeal dismissed]

***[Bahasa Malaysia** Translation of Headnotes]*

***KONTRAK:** Kemungkiran - Tahap gantirugi - Pampasan bagi kemungkiran kontrak telah dipersetujui - Samada boleh didapatkan kembali dengan simpliciter - Samada pampasan seharusnya munasabah - Samada gantirugi sebenar hendaklah dibuktikan - Akta Kontrak 1950 s. 75 - Kesan yang wajar.*

Perayu telah melantik responden sebagai wakil pelancung mereka, dan selaras dengan itu, memberikan responden latihan ketika bekerja sebagai seorang pemandu pelancung. Sebagai balasan bagi latihan tersebut, melalui satu perjanjian bertarikh 9 Mac 1987, responden telah mengaku janji untuk berkhidmat dengan perayu selama 3 tahun, dan seterusnya, membayar perayu RM20,000 sebagai pampasan yang dipersetujui sekiranya beliau meninggalkan perayu dalam tempoh masa tersebut.

Dalam memungkiri perjanjian tersebut, responden telah meninggalkan perayu selepas berkhidmat selama 2 tahun dan 21/2 bulan. Perayu telah dengan jayanya mendakwa untuk mendapatkan pampasan yang dipersetujui dalam Mahkamah Sesyen, dimana responden telah pun merayui, Hakim Azmel Maamor memutuskan bahawa pampasan sebanyak RM20,000 yang dipersetujui di sini tidak boleh dikuatkuasakan kerana merupakan satu penalti, dan keduanya bahawa gantirugi sebenar tidak dibuktikan oleh perayu, dan dengan itu, mengenepikan penghakiman Mahkamah rendah. Terhadap keputusan ini perayu kini membuat rayuan.

Diputuskan:

Oleh Siti Norma Yaakob, HMR (menyampaikan penghakiman Mahkamah):

[1] Walaupun terdapat perkataan-perkataan yang mengecualikan seperti "whether or not actual damage or loss is proved to have been caused thereby" dalam s. 75 Akta Kontrak, gantirugi yang dikatakan telah dialami, mesti dibuktikan. Satu fasal dalam sesuatu perjanjian yang terlingkung di dalam s. 75 mestilah dijadikan tertakluk kepada penentuan Mahkamah bahawa gantirugi sedemikian yang dipersetujui merupakan pampasan yang wajar bagi pihak yang terjejas.

[2] Dalam kes semasa ini, walaupun dengan sifat jumlah yang dinyatakan (ianya menjadi satu penalti) tahap gantirugi boleh dikuatkuasakan dengan syarat terdapat bukti oleh perayu bahawa mereka telah mengalami kerugian dan gantirugi sehingga kepada had kuantum "agreed compensation".

[3] Sifat kerugian yang dialami oleh perayu adalah antara lainnya perbelanjaan yang dialami oleh mereka kerana memberikan latihan sewaktu kerja bagi responden. Perayu sepatutnya tidak mengalami kesukaran untuk membuktikan kerugian itu jika mereka telah menyimpan akaun bagi jumlah perbelanjaan yang dialami bagi latihan yang sedemikian. Akaun yang sedemikian tidak dikemukakan, dan dalam keadaan tersebut, Hakim yang bijaksana betul dalam memutuskan bahawa perayu telah gagal untuk membuktikan kerugian yang sebenar yang dialami. Ianya tidak memadai bagi perayu bergantung kepada jumlah yang ditentukan dalam perjanjian tersebut sebagai tahap kerugian mereka tanpa membuktikan kerugian sebenar.

[Rayuan ditolak]

Cases referred to:
Bhai Panna Singh v. Bhai Arjun Singh [1929] AIR Privy Council 179 ***(foll)***
S.S. Maniam v. The State of Perak [1957] 23 MLJ 75 ***(foll)***
Jagathesan v. Linggi Plantations Ltd. [1969] 2 MLJ 255 ***(foll)***
Wearne Brothers (M) Ltd. v. Jackson [1966] 2 MLJ 155 ***(foll)***
Selva Kumar A/L Murugiah v. Thiagarajah A/L Retnasamy [1995] 2 CLJ 374 ***(refd)***

Legislation referred to:
Contracts Act 1950, s. 75
Indian Contract Act 1872, s. 74

For the appellant - L.C. Chong (C.H. Foong with him); M/s. L.C. Chong & Co.
For the respondent - K. Lopez (W. Pareira with him); M/s. Kamarudin & Partners

JUDGMENT

Siti Norma Yaakob JCA:

We had after hearing arguments dismissed this appeal with costs.

The factual background of this appeal is not disputed. The appellants/plaintiffs who are tour and travel operators had sued the respondent/defendant in the Sessions Court for a liquidated sum of RM20,000 being the agreed compensation payable to the appellants for breach of a term of an agreement dated 9 March 1987 (the agreement) entered into between them.

Pursuant to a letter of appointment dated 27 February 1987, the appellants appointed the respondent as their tour representative and in that capacity the respondent was given on the job training as a tour guide. In consideration for such training, the respondent undertook to serve the appellants for a minimum

period of 3 years and subject to other terms and conditions contained in the agreement. For the purpose of this appeal, Article VI of the agreement is most significant and it reads as follows:

Article VI

> The Employee shall work with the Company for a minimum period of three (3) years commencing from 9 March 1987. In the event the Employee should leave the Company within the said period, the Employee shall pay the sum of Ringgit Twenty Thousand (RM20,000) as agreed compensation to the Company for the job training given to the Employee.

In breach of Article VI, the respondent tendered his resignation on 23 May 1989 after having served only 2 years and 2½ months and in the Sessions Court the appellants succeeded in their claim for RM20,000 as agreed compensation under Article VI.

Dissatisfied the respondent appealed and Dato Azmel Maamor J, allowed the respondent's appeal and set aside the judgment entered against him. It was the appeal against this part of the Judge's order, that we are concerned with and the only issue before us is the interpretation to be given to Article VI read together with s. 75 of the Contracts Act 1950.

The fact that Article VI falls within the ambit of s. 75 is acknowledged by the parties and for ease of reference, I reproduce the provisions of s. 75.

When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for.

There is a line of authorities as to the effect and extent of s. 75.

I begin with *Bhai Panna Singh v. Bhai Arjun Singh* [1929] AIR Privy Council 179, where s. 74 of the Indian Contract Act 1872 which contains similar provisions as our s. 75 was interpreted by Lord Atkin as follows:

The effect of s. 74, Contract Act of 1872, is to disentitle the plaintiffs to recover simpliciter the sum of Rs.10,000 whether penalty or liquidated damages. The plaintiffs must prove the damages they have suffered.

Thus it is clear that as early as 1929, despite the qualifying words "whether or not actual damage or loss is proved to have been caused thereby," damages allegedlly suffered must be proved. *Bhai Panna Singh's* case was quoted with approval by Thomson J (as he then was) in the case of *S.S. Maniam v. The State of Perak*, [1957] 23 MLJ 75 where His Lordship confirmed

that "in this country there is no difference between penalty and liquidated damages" and in cases whether agreed deposits can be forfeited as damages for the breach of a number of stipulated must depend on whether the amounts forfeited are reasonable. See also the case of *Jagathesan v. Linggi Plantations Ltd.* [1969] 2 MLJ 255.

Again in *Wearne Brothers (M) Ltd. v. Jackson* [1966] 2 MLJ 155, the same principles of law were adopted when Abdul Aziz J held that a clause in an agreement falling within s. 75 must be subject to the Court's determination that such agreed damages is reasonable compensation for the injured party.

The recent judgment of the Federal Court in *Selva Kumar A/L Murugiah v. Thiagarajah A/L Retnasamy* [1995] 2 CLJ 374, gives a complete picture of how s. 75 is to be interpreted and after going through all the authorities including those cited above, Peh Swee Chin FCJ concluded that the qualifying words in s. 75 "whether or not actual damage or loss is proved to have been caused thereby" are limited or restricted to those cases where the Court would find it difficult to assess damages for the actual damage or loss as opposed to all other cases, where a plaintiff in each of them will have to prove the damages or the reasonable compensation for the actual damage or loss in the usual ways".

Having stated the law, we now turn to the facts of the appeal before us. Dato Azmel Maamor J reversed the decision of the Sessions Court on the ground:

(i) that the RM20,000 claimed being a penalty is unenforceable.

(ii) that it is incumbent upon the appellants to prove the actual damage incurred by them for providing the on the job training for the respondent.

Whilst we endorse the latter of the learned Judge's finding we consider the former of his finding to be erroneous. Despite the nature of the amount stated in the agreement, the measure of damages is enforceable provided that there is proof by the appellants that they had suffered loss or damage limited to the extent of the quantum of the "agreed compensation". In this case the nature of the loss suffered by the appellants is *inter alia* the expenses incurred by them for providing on the job training for the respondent. They should not have any difficulty in proving that loss if they had kept an account of the total expenses incurred for such training. The learned Judge however found that no such proof was forthcoming from the appellants as they were content to rely on the amount stipulated in the agreement as their measure of damages without proving actual loss. We found no reason to disturb the finding of the learned Judge and we had accordingly dismissed the appeal with costs and ordered the deposit be paid to the respondent to account of his taxed costs.

Reported by W.A. Sharif